IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-5909

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Fl
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-5909

ROY ALLEN HARICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. Whether the Petitioner is entitled to review of an alleged procedural error by a state court where the error was not objected to at time of trial and where the Florida Supreme Court reviewed and rejected said claim and where no demonstrable prejudice to the Petitioner has been shown.

II. Whether the Petitioner is entitled to review of a perceived error in the admission of certain testimony, previously suppressed, which merely duplicated testimony already received by the jury from other sources.

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 437 So.2d 1082 (Fla. 1983).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 United States Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's cited references, and would additionally cite:

1. Section 924.33 Florida Statutes (1970):

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

STATEMENT OF THE CASE

Roy Allen Harich was indicted by grand jury for the crimes of first degree murder, attempted first degree murder, use of a firearm in the commission of a felony and two counts of kidnapping. The details of this incredibly vicious crime are set forth in the opinion of the Supreme Court of Florida, and do not require restatement.

Harich was convicted on all counts, and sentenced to death on the first degree murder conviction.

The trial judge submitted a written order explaining his decision (and his findings of aggravating and mitigating circumstances). No objection was ever raised regarding this order.

On appeal, Harich fully briefed and argued every finding of the trial court. His brief states that he found the court's written findings inadequate, and he requested (de novo) a remand for the purpose of having the trial judge

submit a more detailed order. He did not, however, suggest that reversal of his sentence was required, nor were any federal or constitutional claims raised regarding this alleged ministerial error by the trial judge. The opinion of the court does not even discuss this issue.

Harich also argued that the trial judge erred in admitting testimony at the sentencing hearing that had been suppressed during the guilt phase of Harich's trial. This testimony involved certain post arrest claims by Mr. Harich that he left his victims (alive) at a convenience store, and a later comment that he threw his gun in a ditch.

Since the jury had already (during the guilt phase) heard the story about the convenience store and obviously rejected it, and since "how" Harich's gun vanished was not a crucial issue at the sentencing phase, Florida's Supreme Court deemed any error in admitting this testimony harmless.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied for several reasons; including Petitioner's failure to raise any federal question (as to ground one) in state court and his failure to allege or show a sufficient basis to prompt this Honorable Court's review of harmless error.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW AN ALLEGED FEDERAL CLAIM THAT WAS NEVER PRESENTED TO THE STATE COURTS AND, EVEN IF EXTANT, WOULD NOT IN ANY EVENT WARRANT REVERSAL.

Although Harich made a passing reference to an alleged "lack of detail" in the trial court's sentencing order while appealing his case to the Supreme Court of Florida, Harich never alleged, argued or demonstrated any Fifth or Fourteenth Amendment claims. In fact, Harich never even suggested to any Florida court that his sentence should be reversed.

Harich's "claim", if any, was so innocuous that it was not even deemed worthy of comment by the Florida Supreme Court.

It is well settled that this Honorable Court does not exercise jurisdiction over questions that were not addressed to the courts of the respondent state. Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969); Monks v. New Jersey, 398 U.S. 71, 90 S.Ct. 1563 (1970); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969).

Harich never alleged any Fifth or Fourteenth Amendment claim, and, in fact, never requested any relief other than a remand for the purpose of supplementing the order of the court. Harich then proceeded to argue every "aggravating" and "mitigating" circumstance in detail, effectively disproving any alleged "inability" to argue.

It was obvious that the claimed "prejudice" in the brief was a chronic reaction to a perceived technical, ministerial, error. It was merely "something to argue" even though, in truth, no prejudice existed. This claim was unworthy of notice by the Supreme Court of Florida, which did not rule upon it.

Traditionally, this Honorable Court has refused to rule on issues that were not properly raised, and thus not ruled upon, by the state courts. Walters v. St. Louis, 347 U.S. 231, 74 S.Ct. 505 (1954); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962).

Of course, if the sentencing order had been deficient, the deficiency would merely be corrected by having the trial judge re-draft his findings. See Holmes v. State, 374 So.2d 944 (Fla. 1977), certiorari denied 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). Such an error would not lead to reversal.

Absent the presentation of any federal claim to any Florida court, certiorari should not be granted.

II. THE PETITIONER HAS FAILED TO ESTABLISH ANY BASIS FOR RECONSIDERATION OF THE FLORIDA SUPREME COURT'S FINDING OF HARMLESS ERROR.

Mr. Harich abducted two young ladies and brutally butchered them with a gun and a knife. The slaughtering of the deceased, supported by graphic evidence and eyewitness testimony clearly overwhelmed any comment that, sometime later, Harich threw away his gun. No one can argue in good faith that the jury, but for the "throw away" comment, would have forgiven Harich for shooting these girls and sawing their throats open with a knife while they were still alive.

The Florida Supreme Court, viewing the totality of the circumstances, made a totally realistic finding of harmless error. "Harmless error" is an available result under Florida law (Section 924.33, Florida Statutes (1970)), and is recognized by this Honorable Court.. Barclay v. Florida, ___U.S. ___ (1983), 103 S.Ct. 3418.

In United States v. Hasting, ___U.S. ___ (1983), 103 S.Ct. 1974, 1980, this Honorable Court stated:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, e.g., Brown (supra) 411 U.S., at 230-232, 93 S.Ct., at 1569-1570;

This Honorable Court is not required to review records and reevaluate findings of harmless error, United States v. Hasting (id), and has made clear its intent to engage in such review sparingly.

Mr. Harich has failed to demonstrate any reason to undertake any review of the Florida court's finding of harmless error. The Florida Supreme Court's finding had an adequate foundation in the substantive law of the state.

See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

This Court has refused to conjecture that the state court acted differently in applying state law than it would, and then set up its own ruling. See Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948). There exists no reason to start now.

The Florida "harmless error" rule states (as does the federal rule) that mere error will not compel reversal absent a showing of prejudice, and there is no presumption of prejudice. Palmes v. State, 397 So.2d 648 (Fla. 1981) cert. den. 454 U.S. 882 (1981); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. den. 444 U.S. 885 (1975).

Again, most of the "objectionable" information had already been exposed to the jury by other witnesses, and thus, when added to the overwhelming evidence against Harich, was of little or no impact. See Milton v. Wainwright, 407 U.S. 371 (1972). The only "new" information was the comment that Harich disposed of his gun (a fact probably assumed by the jury when no gun surfaced at trial).

Harich's crime was incredibly brutal, and met many of the criteria for imposition of the death sentence. Even if the fact he disposed of the gun did relate to, say, a desire to evade prosecution, the totality of the circumstances clearly renders any inference to disposal harmless.

Harich argues that the comment "reinforced the suspicion Harich lied." So? If Harich was ever deemed credible he would have been acquitted. Besides, this claim is totally speculative, and disputed.

The State suggests that the sentencing phase was dominated by the spectre of those helpless, butchered and abused girls, not the image of Harich tossing away his gun sometime later.

Thus, relying upon this Honorable Court's announced standards, and the obviously correct findings of harmless error,

and the absence of a realistic claim of "prejudice", there is simply no reason for this Honorable Court to undertake a review of the finding of harmless error.

CONCLUSION

Mr. Harich raises two claims as justifying the granting of certiorari.

The first ground is one never presented to any state court, and is improper.

The second "ground" is an insufficient request for this Court to undertake its sparingly used power to review findings of harmless error, a request that fails to demonstrate prejudice to his case.

There is no legal basis for the granting of certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Fl
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 83-5909

ROY ALLEN HARICH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To the Supreme Court of Florida, Brief For Respondent In Opposition, by depositing said in the United Post Office, Daytona Beach, Florida, with first class postage prepaid, addressed as follows:

JAMES R. WULCHAK, ESQUIRE,
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER,
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183

on this 9th day of January, 1984.

Mark C. Menser
Of Counsel for Respondent